

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



74-1599

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILSON O. DAVILA,

Defendant-Appellant.  
-----X

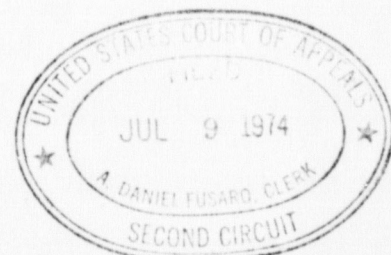
B/p/s  
Docket No. 74-1599

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APPENDIX  
OF DEFENDANT-APPELLANT

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WILLIAM A. SULAHIAN, ESQ.  
Attorney for Defendant-Appellant  
15 Front Street  
Rockville Centre, New York 11571



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73 CRIM. 1067

74-98

Redacted signed

Case 2

A

DATE	PROCEEDINGS	CLERK'S FEE	
		PLAINTIFF	DEFEND
✓ 12-26-73	Archie Van Putten-(atty present) Deft withdraws plea of not guilty and pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adjourned to 2-8-73 at 2:15PM in rm 280. Bail (\$10,000.P.R.B.) unsec. cont'd. Tyler,J.		
✓ 2/22/74	Deft Van Putten sentence adj'd to 3/1/74. Tyler,J.		
✓ 3/1/74	Bench warrant ordered as to deft Van Putten. Tyler,J.		
✓ 3/1/74	A. Van Putten-bench warrant issued.		
✓ 3/8/74	Deft. Van Putten (atty present) adj'd to 3/15/74 for sentence. Tyler,J.		
✓ 3/11/74	Jury trial begun before Tyler,J.		
✓ 3/12/74	Trial cont'd. Count 4 withdrawn- Count 5 dismissed on deft's counsel motion-motion granted. Tyler,J.		
✓ 3/13/74	Trial cont'd & concluded. Jury verdict. Deft Guilty in count 1, 2 & 3. Pre-sentence investigation ordered. Apr. 12, 1974, bail cont. Deft to surrender to U.S. Marshal 3/14/74 at 3PM in rd 22. Tyler,J.		
✓ 3/14/74	Filed Govt's request to charge.		
✓ 3/14/74	Filed Govt's supplemental request to charge.		
✓ 3/15/74	Sentence adjourned 3/22/74. Tyler,J.		
✓ 3/18/74	Sentence adjourned to 4/1/74. Tyler,J.		
✓ 4/1/74	ARCHIE VAN PUTTEN- Filed JUDGMENT (atty present) It is adjudged that the deft is sentenced to the custody of the Atty General for imprisonment for a period of THREE (3) YEARS. Execution of prison sentence is SUSPENDED and the deft is placed on Probation for a period of THREE (3) YEARS subject to the standing probation order of this Court, and subject to the SPECIAL CONDITION that the deft continues to work at the Bronx State Hospital under the supervision of Dr. Courtland Myles. The Court recommends to the Probation Dept that deft secure paid employment as soon as possible. Counts 1 through five (incl.) are dismissed on motion of defense counsel. The consent of the Govt. Tyler,J.		
	4/3/74. Issued copies		ent. 4/8/74.
✓ 4/12/74	Deft's sentence adj'd to 4/26/74 at 2:15pm in R 128. Tyler,J.		
✓ 4/22/74	Van Putten- Filed PIA 20 approval for payment of fees on appeal. Tyler,J.		

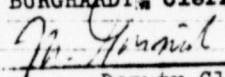
DATE

PROCEEDINGS

- 4/26/74 Wilson O. Davila - Filed JUDGMENT (atty present) Deft is hereby committed to the custody of the Atty Gen. or his authorized representative for imprisonment for a period of TWO (2) YEARS on each of counts one, two and three to be served CONCURRENTLY with each other. It is adjudged that the deft is sentenced pursuant to T. 18, Sec. 5010(b) as ext. by Sec. 4202 of the U.S. C. the deft is placed on Special Parole for a period of THREE (3) YEARS, said period of Parole to commence upon expiration of prison sentence. Count four is dismissed on motion of deft's counsel with the consent of the Govt. Tyler, J.  
4/29/74 issued commitments. ent. 4/29/74.
- ✓ 5/3/74 W. Davila- filed GJA Financial affdvt 23.
- 4/29/74 W. Davila- Filed notice of appeal in forma pauperis from judgment 4/26/74. So ordered Tyler, J. mn
- 5-10-74 WILSON O. DAVILA - FILED AMENDED JUDGMENT
- 5-15-74 WILSON O. DAVILA - CJA 21 (COPY 5) FILED.
- 5-16-74 WILSON O. DAVILA - FILED JUDGMENT & COMMITMENT w/ PRISONERS RECEIPT
- 5-14-74 FILED TRIAL TRANSCRIPTS OF RECORD OF PROCEEDINGS DTD APRIL 11, 12-74.
- 5-14-74 FILED TRIAL TRANSCRIPTS OF RECORD OF PROCEEDINGS DTD APRIL 26.

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

  
Deputy Clerk

USA-SDNY - IND./INF. (Conspiracy to distribute and possess with intent to distribute narcotic drug.)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

WILSON O. DAVILA

ARCHIE VAN PUTTEN,

Defendant,

INDICTMENT

TO OR.

THE GRAND JURY CHARGES:

1. From on or about the 1st day of July, 1973, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, WILSON O. DAVILA, and ARCHIE VAN PUTTEN,

the defendant, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

15-113 - 10.1 - IND./INF. (Conspiracy to distribute and possess with intent to distribute narcotic drugs.)

#### OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On July 30, 1973, the defendant and JESON O. DAVILA met with the defendant A. CHIEF VAN PUTTEN.

2. On July 30, 1973, the defendant and JESON O. DAVILA entered an automobile in the parking area of the Bronx Whitestone Motel, Bronx, New York.

3. On July 30, 1973, the defendant and JESON O. DAVILA went to a parking area adjacent to the Bronx Whitestone Motel, Bronx, New York.

(Article 21, United States Code, Section 844)

SECOND COUNT

The Grand Jury further charges:

On or about the 30th day of July, 1973  
in the Southern District of New York,  
WILSON O. DAVILA and ARCHIE VAN PUTTEN

the defendant, , unlawfully, intentionally and knowingly  
did distribute and possess with intent to distribute a  
Schedule II narcotic drug controlled substance, to wit,  
approximately 1.94 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

ONLY COPY AVAILABLE

~~THIRD COUNT~~

The Grand Jury further charges:

On or about the 10th day of July, 1973

in the Southern District of New York,

ELIEN O. DAVILA, and ARCHIE VAN PUTTEN,

the defendant<sup>3</sup>, unlawfully, intentionally and knowingly  
did distribute and possess with intent to distribute a  
Schedule<sup>II</sup> narcotic drug controlled substance, to wit,  
approximately 490.4 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

FOURTH COUNT

The Grand Jury further charges:

On or about the 30th day of July, 1972  
in the Southern District of New York,

ILON G. DAVILA and ROBERT L. FOTINI

the defendant, , unlawfully, wilfully and knowingly did  
distribute and possess with intent to distribute a  
Schedule II narcotic drug controlled substance, to wit,  
approximately .91 gram cocaine hydrochloride.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

FIFTH COUNT

The Grand Jury further charges:

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 1973

in the Southern District of New York,

JESON O. DAVILA and ADRIAN PA. \_\_\_\_\_

the defendant \_\_\_\_\_, unlawfully, wilfully and knowingly did  
distribute and possess with intent to distribute a  
Schedule I \_\_\_\_\_ narcotic drug controlled substance, to wit,  
approximately .12 gram heroin hydrochloride.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

FORWARDED

PAUL J. CURRAN  
United States Attorney

DEFT. Guilty IN Count 1, 2 & 3. J. S. J. [unclear]  
April 12, 1974, Bail Continued - DEFT. to Surrender  
to U.S. Marshal March 14, 1974 AT 3 P.M. Rm 22

Tyler, J.

March 15, 1974 Sentence Adjourned to 3/22/74

Tyler, J.

March 18, 1974 Sentence Adjourned to April 11, 1974

Tyler, J.

April 1, 1974---

SENTENCE

① Leonard J. Levenson, Esq.

ARCHIE VAN PUTTEN (Atty. present, and AUSA Richard Wile, present)  
On count one the defendant is sentenced to the custody of the Atty. General  
for a period of Three years. Execution of the prison sentence is suspended  
and the defendant is placed on Probation for a period of Three years, subject  
to standing probation order of this Court and subject to the Special Condition  
that defendant continue to work at the Bronx State Hospital under the supervision  
of Dr. Courtland Myles.  
Court recommends that Probation Office secure paid employment for defendant as  
soon as possible.  
Open counts 2, 3, 4, & 5 are dismissed on motion of defense counsel with consent of  
the Govt.

Tyler, J.

①

12 1974

Verla Sentence adjourned to 4/26/74  
at 2:15 pm in Room 128. ① Tyler, J.

-SENTENCE-

WILSON O. DAVILA

AUSA: GLEKEL  
Deft. Counsel:  
William A. Sulahian

On each of counts 1,2, & 3 deft. is sentenced to the custody of the Atty. General for imprisonment for a period of two years on each count to be served concurrently.

It is adjudged that the deft. is sentenced as a YOUNG ADULT OFFENDER pursuant to Title 18, Section 5010(b) as extended by section 4209 of U.S. Code.

Pursuant to Title 21, Sec. 841, U.S.C., deft is placed on Special Parole for a period of three years to commence upon expiration of prison sentence.

Count four is dismissed on motion of defts. counsel with the consent of the Govt.

(Note; Count 5 was dismissed at trial).

Deft. advised of his right to appeal.

TYLER, J.

United States District Court  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES OF AMERICA

ELSON O. DAVILA,  
ARCHIE VAN PUTTEN,

Defendants.

DEC. 3 DEFS PLEAD NOT  
GUILTY ATTY PRESENT  
BAIL CONT. ASSA. TO TYLER.

JUDGE TYLER

DEC 26 1973

Archie Van Putten (Atty Leonard J. Levenson)  
USA: Richard

Wife.  
Wife. withdraws plea of not guilty  
and pleads GUILTY to count #1 only. Re-  
sentencing investigation ordered. Sentence affirmed  
to February 8, 1974 at 2:15pm. in Room 2864.  
Bail (\$10,000. unrec.) continued. Tyler J.

INDICTMENT

1, U.S.C., §§ 812, 841(a)(1)  
and 841(b)(1)(A)

PAUL J. CERRAN  
United States Attorney  
TE BELL

2/22/74. Atty Sent. acc. H-45 (L. FT. Van Putten)  
H-15 D. 4. 3/1/74 Tyler J.

3/1/74. B/warrant ~~Issued~~ Ordered - H-45  
DEFT. VAN PUTTEN Tyler J.

3/8/74. DEFT. VAN PUTTEN (Atty Present) H-15 D-45  
3/15/74 - In Sentence Tyler J.

3/22/74 - Jury Trial Begun. Before Tyler J.  
Trial Continued.

Count 4 withdrawn - Count 5 Dismissed on  
DEFT's Counsel Motion - Motion Granted  
Jury Deliberating.

## 2 CHARGE OF THE COURT

3  
4 (Tyler, D.J.)

5 Mr. Ramos and ladies and gentlemen of the jury:

6 As you approach the problems of this task of  
7 citizenship, please remember that it is your sworn duty  
8 to weigh the evidence calmly and dispassionately, without  
9 sympathy or prejudice for or against either the defendant  
10 or the Government.11 As I think most of you know, and understand,  
12 our system of jurisprudence defines the duties of the Judge  
13 on the one hand and the jury on the other. It is exclusively  
14 the function of the Judge, of course, to set forth the  
15 rules which govern the case, with instructions as to their  
16 application.17 On these legal matters you must take the law  
18 as I give it to you in the next moments, and you will not  
19 concern yourselves with statements as to the law, if any,  
20 which counsel may have made in their summations or during  
21 any portion of the trial.22 For what I am sure are perfectly obvious and  
23 understandable reasons, you should not single out any one of  
24 my remarks as stating the law, but you should consider my  
25 remarks as a whole when you have retired to your jury room

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mdb

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to deliberate.

I want to make it very plain at this point that my actions during this trial in passing upon motions or objections made by counsel are not to be taken by you as any indication of either guilt or innocence on the part of the defendant Wilson O. Davila. As I am sure you all understand, counsel not only have the right, but indeed they have the duty to object to the introduction into evidence of any statements or exhibits which they believe should not be admitted, and make similar applications of procedural nature.

These are questions of law and procedure with which you need not have any concern in your deliberations on the facts in this case.

Similarly, I ask you to draw no inference from the fact that upon occasion I asked questions of a witness or witnesses. For better or worse these were only intended to either clarify matters or expedite matters, and certainly were not intended to suggest any opinions on my part as to the guilt or innocence of the defendant, or whether one of the witnesses who appeared before us in this short trial was more credible than another witness.

What this all, of course, comes down to is this, and I think the lawyers have pretty much made this clear

2 to you, but I want to emphasize as well that it is your  
3 recollection of the evidence and only your recollection  
4 and understanding of that evidence which can serve as the  
5 basis of your deliberations in the jury room in this case.

6 This flows from the principle that you, the jury,  
7 are the sole and exclusive finders and judges of facts based  
8 upon your recollection of the evidence. Therefore, if  
9 I should state in the course of my remarks in the next few  
10 moments my recollection of certain evidence and what I  
11 state as my recollection does not accord with your recollec-  
12 tion, please accept your recollection of that evidence as  
13 controlling.

14 The same principle should be expressed as to  
15 the lawyers. In other words, if they made certain argu-  
16 ments and stated certain evidence as they recall it, and  
17 their recollection is not the same as yours, accept your  
18 recollection and not theirs as controlling in your delibera-  
19 tions.

20 As you were told at the outset and as I am sure  
21 you understand, the law presumes a defendant such as Wilson  
22 O. Davila to be innocent of the charges of crime.

23 The indictment is merely an accusation or a  
24 pleading. It is no evidence or proof of the defendant's  
25 guilt and it does not detract one whit from the presumption

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mdb

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of innocence riding in favor of the defendant. You will not give any weight whatsoever to the fact that a grand jury sitting in this District returned this indictment against Mr.Davila, against him in this case.

As you know,Davila pleaded not guilty before trial. Thus the Government, as you have been told, has the burden of proving the essential elements of these charges, which by the way now consist of, you will recall, Counts 1, 2 and 3 only, beyond a reasonable doubt.

This is a burden that never shifts and remains upon the prosecution throughout the entire trial. Under our system a defendant does not have to prove his innocence.

As stated, he is presumed innocent of the charges contained in this indictment. This presumption of innocence was in his favor as we started, it has continued in his favor right up to this moment, and it will remain in his favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied the Government has maintained its burden of proving the guilt of the defendant beyond a reasonable doubt.

Naturally, the question arises at this point as to just what does the law mean by this concept or ruling of reasonable doubt. In a sense you can say that the words "reasonable doubt" come close to defining themselves.

1                   mdb  
2                   Reasonable doubt is a doubt founded in reason,  
3                   and arising out of the evidence in the case or perhaps  
4                   out of lack of evidence. It is a doubt which a reasonable  
5                   person has after carefully considering and weighing all of  
6                   the evidence. It means a doubt that is substantial and  
7                   not just shadowy or ephemeral. A reasonable doubt is  
8                   one which appeals to your reason, your judgment, your common  
9                   sense and your own experience in life.

10                   It is not caprice, whim, or speculation, it is  
11                   not an excuse to avoid a difficult or unpleasant duty, it  
12                   is not sympathy for the defendant.

13                   Rather, ladies and gentlemen of the jury, the  
14                   law succinctly defines reasonable doubt to be a doubt which  
15                   would cause prudent persons to hesitate before acting in  
16                   matters of importance to themselves.

17                   Now, finally, on this subject, of course reasonable  
18                   doubt does not mean beyond all possible doubt. If  
19                   the latter were the applicable standard, few if any men or  
20                   women would ever be convicted of any charges of crime.

21                   As you know, it is practically impossible for  
22                   a human being to be absolutely convinced of any controverted  
23                   fact which by its nature is not susceptible to mathematical  
24                   computation and certainty .

25                   During this trial I think it has been made clear

1           to you that we are striving to see that the case is decided  
2           only on the basis of evidence admitted during the trial  
3           in this courtroom in your presence, not on the basis of any-  
4           thing that you may have seen or heard or felt outside of the  
5           courtroom.  
6

7                       Generally speaking, in trials in American  
8           courts there are two types of evidence. One is what is  
9           called direct evidence, and the other is called circumstantial  
10          evidence.

11                      Examples of direct evidence, of course, would be  
12          sworn testimony on both direct and cross-examination  
13          from this little witness box across the room from witnesses,  
14          any exhibits which are received in evidence -- that is to say  
15          papers or physical objects. Another form of direct evidence  
16          would be stipulations of fact between the lawyers, but as I  
17          recall it there were no such stipulations of fact in our  
18          trial.

19                      Therefore, as matters of direct evidence the  
20          sworn testimony of witnesses and the exhibits actually  
21          received are the only direct evidence which you are to con-  
22          sider in deliberating in the jury room. Any evidence as  
23          to which an objection was sustained by the Judge you should  
24          entirely disregard.

25                      Questions asked by the lawyers and questions

1  
2 asked by the Judge standing alone, of course you will dis-  
3 regard. It is only the answer of the witness, taken in  
4 light of course with the questions they are answering which  
5 are evidence.

6 Of course, as you have been told several times,  
7 opening statements and closing arguments of Messrs. Sulahian  
8 and Wile, and the Judge's instructions, are certainly not  
9 evidence.

10 In addition to your consideration of the direct  
11 evidence you are permitted to and indeed you should draw  
12 from the facts which you find have been proved by such direct  
13 evidence such reasonable inferences as seem justified to you  
14 in the light of your own experiences.

15 I am merely talking here about circumstantial  
16 evidence. You have all used the term and the principle  
17 of circumstantial evidence, I am sure. Very simply, for our  
18 purpose, all I mean by circumstantial evidence is evidence  
19 which does not itself directly establish a fact sought to  
20 be proved but rather may lead you to the fact sought to be  
21 proved by the everyday process of reasoning or it is some-  
22 times called inference.

23 In this connection, of course, you must accept  
24 and apply in your deliberations on the evidence, whether  
25

1 it be direct evidence or circumstantial evidence, any  
2 presumptions or other rules, such as the presumption of  
3 innocence and the rule of reasonable doubt.

4 I turn now to another subject, and that is this.  
5 In every crime there must exist what I will call a union  
6 or joint operation of act and intent, or as the latter is  
7 sometimes called, guilty knowledge.

8 As Government counsel I am sure knows, the burden  
9 is always upon the prosecution to prove both act and  
10 intent beyond a reasonable doubt. A person who knowingly  
11 does an act which the law forbids or knowingly fails to do  
12 an act which the law requires to be done intending with  
13 bad purpose either to disobey or disregard the law may be  
14 found to act with intent or guilty knowledge.

15 Intent or guilty knowledge may be proved by  
16 circumstantial evidence. Indeed, it rarely if ever can  
17 be established by any other means. While witnesses may  
18 see and hear and thus be able to give us testimony of what  
19 a defendant does or fails to do on a given occasion, that  
20 witness can give you no eye-witness account of the state  
21 of mind with which the acts were either done or omitted.

22 On the other hand, what a defendant does or  
23 fails to do may indicate an intent or lack of intent.

24 The proof of the circumstances surrounding the  
25

1 transactions or events as brought out in the evidence can  
2 supply an adequate basis for finding that a defendant acts  
3 wilfully.  
4

5 You are all familiar with the old adage that  
6 the actions of a man or woman must be set in their time and  
7 place. Similarly, you are familiar with the old saying  
8 that the meaning of a word is understood only in its relation-  
9 ship to other words in a sentence. So the meaning of  
10 a particular act may depend upon the circumstances surround-  
11 ing that act.

12 Thus, you may consider the evidence which you  
13 recall and which relates not only to a given event or  
14 transaction, but to the surrounding circumstances as well  
15 in your consideration of this issue of intent, more about  
16 which I will speak in a moment or two.

17 Parenthetically, here, however, let me point  
18 out that it is not necessary for the prosecution to prove  
19 knowledge of the defendant that a particular act or failure  
20 to act is a violation of a specific law or statute. Unless  
21 and until outweighed by evidence to the contrary, the  
22 presumption is that every citizen knows what the law forbids,  
23 and what the law requires to be done.

24 I turn to the three counts here on trial. You  
25 will remember I read them to you yesterday morning at the

outset of our trial, and I explained to you at that time, and I repeat, that each of these counts, both the conspiracy count, Count 1, and the two substantive counts, Counts 2 and 3, charge violations of specific sections of what is sometimes called the 1970 Federal Drug Abuse Prevention law.

The two substantive counts -- that is, Counts 2 and 3 -- charge violations of the following statutory language in that 1970 legislation. Let me quote this particular section in relevant part as follows:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

A separate section of that particular statute makes it a separate crime to conspire to violate that particular statutory language which I just read you. Hence you can see why Count 1 charges the separate offense, so-called, of conspiracy to violate this particular drug statute of 1970.

Still another section of the 1970 law, or statute, defines controlled substances to include the narcotic drug cocaine. Specifically I instruct you as a matter of law that a so-called Schedule 2 substance under the 1970 statute is cocaine hydrochloride.

2 Let me read you Count 1 again. It is pleaded  
3 here that from on or about the first day of July, 1973,  
4 and continuously thereafter, up to and including the date of  
5 the filing of this indictment in this judicial district,  
6 Wilson O. Davila and Arch ie Van Pötten, the defendants, and  
7 others, to the grand jury unknown, unlawfully, intentionally  
8 and knowingly conspired, confederated and agreed together  
9 and with each other to violate the 1970 drug statute, the  
10 significant part of which I just read to you.

11 Count 1 goes on to allege that it was part of  
12 said conspiracy that the defendants unlawfully, intentionally  
13 and knowingly would distribute and possess with intent to dis-  
14 tribute Schedule 1 and 2 narcotic drug-controlled substances,  
15 the exact amount thereof being to the grand jury known, in  
16 violation of the statute which I have read or summarized here.

17 Now, as required by law, Count 1 then goes on  
18 to plead what the law calls overt acts. Those overt acts  
19 pleaded in Count 1 here are three in number. I quote:

20 "In pursuance of the said conspiracy and to  
21 effect the objects thereof, the following overt acts were  
22 committed in this judicial district. Number 1, on July  
23 30, 1973, defendant Wilson O. Davila met with defendant  
24  
25

Archie Van Putten.

"Overt Act Number 2. On July 30, 1973, the defendant Archie Van Putten entered an automobile in the parking area of the Bronx Whitestone Motel, Bronx, New York.

"Overt Act Number 3, and last. On July 30, 1973, the defendant Wilson O. Davila went to a parking area adjacent to the Bronx Whitestone Motel, Bronx, New York."

Now, as already implied, if not stated, the conspiracy charge just read to you, Count 1, is entirely separate and distinct from the substantive charges, Counts 2 and 3.

On the other hand, as I am sure you already understand, the evidence dealing with the substantive counts on the one hand and the conspiracy count overlap a great deal, as you know from what you have heard from the witnesses and from the arguments of Messrs. Sulahian and Wile.

In any event, I instruct you that in order to find the defendant guilty of conspiracy as charged here in Count 1, you must be persuaded beyond a reasonable doubt of the following essential elements. First, that some time between July 1 of last year and November 23 of last year -- that is, the date on which the indictment in this case was filed -- there was an agreement as described or pleaded in Count 1 between Wilson Davila and Archie Van Putten.

Specifically, you would have to be persuaded

beyond a reasonable doubt that this agreement was entered into to unlawfully and intentionally either possess with intent to distribute or distribute a Schedule 2 drug, substance, that is to say cocaine.

Second, you must be persuaded beyond a reasonable doubt that the defendant Wilson O. Davila knowingly and understandingly and purposely associated himself with such a criminal agreement or conspiracy or scheme as here charged.

Third, you must be persuaded beyond a reasonable doubt that at least one of the overt acts as pleaded in Count 1 actually occurred and was designed to effectuate the objects of this conspiracy.

Now, under the law, ladies and gentlemen, a conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose. The gist of the crime of conspiracy, in other words, is the unlawful agreement to violate the law.

Whether or not these persons who knowingly join the conspiracy actually succeed in accomplishing the unlawful ends which they have in mind is immaterial to a conviction. In other words, for example, I and several other people in this room could be found guilty of conspiring to rob a bank even if the proof showed that we did not

2 successfully accomplish that robbery.

3 Therefore, not surprisingly, a conspiracy  
4 has frequently been called a partnership for criminal purposes.

5 Now, this being so I nevertheless instruct you  
6 that it is not necessary for the prosecution to show  
7 that the conspirators sat around a table and formally came  
8 to some agreement or signed a piece of paper evidencing  
9 some formal agreement to carry out an unlawful scheme.

10 As you very well understand, I am sure, it would  
11 be extraordinary if the proof showed there were any formal  
12 arrangements or understandings of this kind simply because  
13 when two or more people decide to agree to violate the  
14 criminal laws, or some of them, they don't ordinarily like  
15 to have their understandings out in the open.

16 Therefore, your common sense will tell you that  
17 when people enter into a criminal conspiracy much is left  
18 to unexpressed understanding. Thus, it is sufficient if  
19 the proof shows to your satisfaction beyond a reasonable  
20 doubt that two or more persons, as alleged here, in any  
21 manner, through any contrivance, impliedly or tacitly, came  
22 to a common understanding to violate the narcotics laws.

23 I also point out that though it is true, as  
24 I have heretofore stated, one can be found guilty of  
25 conspiracy even if the object of the conspiracy never

succeeds, if you were to determine that there is proof that the conspiracy did succeed that might be evidence that you could consider showing that the actual criminal scheme in fact existed.

Now, in regard to element Number 2 -- that is, proof beyond a reasonable doubt that Mr. Davila was a willing, knowing and purposeful member of this scheme to traffic in cocaine -- that is, either possess it with intent to distribute or to distribute same -- I point out to you that you have got to determine from the proofs whether this is a situation where Davila just happened by accident to do something or some things which happened to assist others in a criminal conspiracy which he really didn't know about, then there wouldn't be sufficient evidence to convict Davila of this second essential element, or I should say on the basis of this second essential element, because there there would be no satisfactory evidence that he knew what was going on and that he purposely and intentionally joined the scheme.

In this connection, however, it is possible for a conspirator to knowingly join in or participate in a conspiracy without actually knowing all of the details of the other things that other members were doing in that criminal scheme or conspiracy.

1  
2 For example, it is perfectly possible that  
3 persons in a criminal conspiracy can have quite different  
4 roles. One person's role is one thing, and another  
5 member's role is another thing. That being so, you must  
6 understand that the central question is simply, did the  
7 conspirator under consideration know essentially what was  
8 going on and what the objects were, and did he then partici-  
9 pate knowing all of this with an intention to do so -- in  
10 other words, to see that the criminal scheme succeeds?

11 Now, in this regard I caution you that of course  
12 it wouldn't be enough if all the proofs were to show that  
13 Mr.Davila happened to be a friend of a member of the  
14 conspiracy. Mere association with a criminal conspirator  
15 does not make a citizen guilty of being a member of that  
16 conspiracy.

17 You can see why that is the law. So to illustrate  
18 in our case, if all you were to determine was that Wilson  
19 Davila happened to be a friend or associate of Archie  
20 Van Putten, who concedes he was in a scheme to traffic  
21 in cocaine, that wouldn't be enough. Again, as I said,  
22 the central part here of this second essential element is  
23 that you have got to be persuaded that Davila knew what  
24 was going on, and he took steps knowingly and intentionally  
25 to be part of an illicit agreement to traffic in cocaine.

1                   The third and last essential element is proof  
2  
3 of at least one of the overt acts alleged in this indict-  
4 ment.   The Government argues that it has proved all  
5 three of these overt acts.

6                   Under the law, however, in order to sustain a  
7 conviction here of this third essential element, that is,  
8 proof of an overt act, all the Government has to do is  
9 prove one of these three overt acts.

10                  Now, what does the law mean by an overt act?  
11 Very simply, an overt act is any step, action or conduct  
12 which is taken to achieve or further the object or objects  
13 of the criminal scheme as alleged.

14                  However, standing alone an overt act need not  
15       of itself or in itself be criminal in nature.   It can  
16 be as innocent as the act of getting in and out of an auto-  
17 mobile, for example, or lighting a cigarette or a pipe,  
18 or getting on the telephone.   The important point is it  
19 has got to be an act, as you appraise the evidence, designed  
20 to effect or achieve the objects of the criminal scheme  
21 charged in Count 1.

22                  It is also not necessary, however, for the  
23 Government to show that the defendant on trial actually  
24 participated in an overt act or in the several overt acts  
25 here alleged.

Of course, as you know, overt act Number 1 and Number 3 have to do with actions alleged on the part of Mr. Davila.

The Government says they have proved beyond a peradventure both of these overt acts by Mr. Davila. But it would be sufficient here, as I have already said, if only one of these acts was proved, and it would even be sufficient if the only overt act you find to have been proved was overt act Number 2, which refers to Archie Van Putten himself. So long, of course, as you find that the first two essential elements which I have already discussed with you have been proved in respect to Wilson O. Davila.

To summarize, therefore, you must be satisfied before you can convict Davila under Count 1 of the following elements. Number 1, that there was a scheme to traffic in particularly cocaine, in existence between July 1 of last year, and on or about November 23 of last year. Actually, you only really have to focus on one day because the Government's proof supports that that is when all the activity took place, but as long as you find it is a day within the period of the prescribed dates, that is sufficient.

Secondly, you must be satisfied that the proofs show beyond a reasonable doubt that Davila knowingly

1  
2 and purposely associated himself with a scheme to traffic  
3 in cocaine hydrochloride, or put more precisely, in a scheme  
4 to either distribute cocaine or possess cocaine, with  
5 intent to distribute it.

6 Third and last, you must be satisfied beyond  
7 a reasonable doubt at least one of the three overt acts  
8 actually occurred as alleged.

9 I turn now to the two substantive counts. Let  
10 me read those again. They both charge possession with  
11 intent to distribute or distribution on the day of July  
12 30, 1973. Count 2 describes such activity on the part  
13 of both defendants in respect to the smaller portion of  
14 cocaine, which I believe the chemist testified came out  
15 at a weight of 1.94 grams. That is Count 2.

16 Count 3 treats the so-called larger package,  
17 that is the contents of the brown bag, and so on, which was  
18 delivered up there in the parking lot, according to Van  
19 Putten, and Special Agent Donald Ferrarone.

20 As I recall it, the Government chemist testified  
21 about the percent of purity and the weight coming out to  
22 4.94 grams.

23 The essential elements the Government must  
24 prove in each of these counts in order to support a convic-  
25 tion are as follows. First, that on or about July 30,

1973, that the defendant Davila either distributed or possessed with intent to distribute a narcotic drug-controlled substance, specifically in this case the so-called Schedule 2 substance, to wit, cocaine.

Second, you must be satisfied beyond a reasonable doubt, if you do find such distribution or possession with intent to distribute, that it was done knowingly and intentionally and unlawfully by the defendant Davila.

Third, you must be satisfied beyond a reasonable doubt that the substance described in each count -- that is, Counts 2 and 3 -- was in fact a Schedule 2 narcotic drug-controlled substance.

Let me take up the elements in somewhat reverse order. Let me treat essential element 3. That is, proof that the substances in question were in fact cocaine.

As you know, I have already told you, that cocaine is as a matter of law what is called a Schedule 2 substance under the 1970 statute. You also know the Government produced a chemist who testified that he analyzed Government Exhibits 1 and 2, which are in evidence, and which related as I understand it respectively to Counts 1 and 2, and he told us about his testing it and what he found in terms of percentile of purity and net weight. He also told us the diluting agents which were mixed with the cocaine, as he

1 mdb

2 found it.

3 If you accept that testimony beyond a reasonable  
4 doubt that would be sufficient under essential element  
5 Number 3.

6 The first element, of course, is proof that the  
7 defendant either distributed or possessed with intent to  
8 distribute the cocaine described.

9 I want to focus for you the meaning of the  
10 terms "distribute" and "possess with intent to distribute"  
11 as they are used in the applicable statutory language.

12 First of all, note that in the statute these  
13 terms are stated in the alternative, as indeed they are in  
14 Counts 2 and 3. This means, therefore, that if you are  
15 satisfied either that Davila possessed the cocaine in  
16 question with intent to distribute, or actually distributed, it  
17 that would be sufficient under this element. You don't  
18 have to find both.

19 Now, what do these terms mean? In another  
20 portion of this same 1970 statute the term distribute is  
21 defined to mean the actual or constructive transfer  
22 of a drug such as cocaine.

23 As to the phraseology "possess with intent to  
24 distribute," I point out that the word "possess" has its  
25 usual, ordinary everyday meaning, that is to say, something

1  
2 within one's dominion and control, either physically or  
3 constructively.

4           If I hold up this pen and you see me wield  
5 this pen the last two days and now you see it in my hand,  
6 you would say that the Judge possesses that blue pen, he  
7 has physical control of it. . He has it right in his  
8 hand. That is an easy, everyday form of possession with  
9 which we are all familiar.

10           But let us assume that you were to see my law  
11 clerk go out of the room with the pen, after I whispered  
12 something to her, and even though she physically would then  
13 have it in her possession, you could infer that I told her  
14 to take it somewhere. In other words, I had the kind of  
15 possession which allowed me to ask her or tell her to do  
16 something with that pen. That is an example of what the  
17 law calls constructive possession, i.e., to exercise dominion  
18 and control over where something goes or where something  
19 is transferred, for example. That is what is intended here  
20 by constructive possession.

21           Now, of course, the word "intent" refers to  
22 a person's -- that is, a human being's state of mind. So  
23 to summarize the term possess with intent to distribute  
24 can be fairly defined to mean to control an object such  
25 as a drug with a state of mind or intention to transfer it,

1           mdb  
2           or to hand it over, or to deliver it on a sale to somebody.  
3           That is what the statutory language in question means.

4                       Now, as to the second essential element you  
5           will remember this is the requirement that you have got  
6           to be satisfied that if you find possession, actual or  
7           constructive, on the part of Wilson O. Davila, with intent  
8           to distribute or actual distribution by him of this cocaine,  
9           you have got to be satisfied that he did so unlawfully,  
10          intentionally and knowingly.

11                      What the law means here is not necessarily  
12          that there be any proof to the effect that Mr. Davila knew  
13          he was violating some specific statute. That is not it  
14          at all. Rather, what you have to be satisfied here is  
15          that the defendant knew well what he was doing and he did it  
16          not by accident or coincidence, but he did it because he  
17          intended to do it with full recognition or guilty knowledge  
18          that he was doing an illegal act. That is really what  
19          this second essential element is all about.

20                      There is no need for me to summarize all of the  
21          evidence in the case because very simply the case is very  
22          brief and I know from watching you that you listened very  
23          intently. It is not even necessary for me to summarize  
24          all the arguments of counsel. Suffice it, however, to  
25          summarize a few of the more critical arguments as I

understand them.

I think you well know that basically the position of the Government is that Davila was the major figure as between Van Putten and Davila, and that Davila was really the supplier of the cocaine and that Archie Van Putten was acting as his agent in dealing with a man named Dominick, who actually, as we all now know, was Federal Drug Agent Donald Ferrarone.

Therefore, the Government says, concededly, there is no evidence to show except through Van Putten that Davila ever had his hands physically on the drugs in question. And the Government says there is a very good reason why the proof doesn't show that, because Davila made the arrangements so that he wouldn't be shown to the buyer as having any contact, physical, with the drug or drugs in question.

On the other side of the coin, the defense is that, true, Davila knew Mr. Van Putten, and Davila knew Van Putten as a person from whom he could occasionally buy a spoon of cocaine, and specifically of course, as you know, Davila claims that on July 30th that he happened to go to the Bronx Whitestone Motel for no other reason than to wait for Archie, who had promised him either as a favor or otherwise, I can't quite recall, but something to the

effect that if he waited there in the motel parking lot, why, Archie was going to deliver a spoon to him so that he and his brother could have a snort or a blow while they were doing some work at his brother's house in the Bronx.

However poorly you may think of snorting or blowing cocaine, of course that is not the charge here in this case and therefore according to the defense argument, if you accept that as being proved by the facts, you would be obliged to acquit Wilson O. Davila of these charges.

On the other hand, if you believe the Government agent or agents, I should say, two of them testified, and Van Putten, why, then, you would be able to convict the defendant so long as you find that the Government has proved through such testimony the essential elements first of the conspiracy charge, and then one or both of the so-called substantive charges, 2 and 3.

There are a couple of things I want to talk to you about before I conclude, about your critical role and indeed your crucial and sole role, meaning by that that you and you alone have this function, and that is your role as the sole judges of the credibility of witnesses and the weight which their testimony on direct and cross deserves.

Under the law the lawyers can't tell you how to decide credibility and neither can the Judge. Therefore,

1           you should consider such criteria as the demeanor of the  
2           witness as he sat here and gave his evidence, any motive  
3           that he might have to obfuscate or distort the truth,  
4           his interest in the outcome of this case -- that is to say,  
5           your verdict in this case -- his strength or weakness of  
6           recollection of past events and conversations, his testimony  
7           as considered and compared with other evidence in the  
8           case, either testimonial evidence or physical or documentary  
9           evidence. Those and other obvious criteria that you would  
10          use in sizing up people with whom you deal in your ordinary  
11          lives of course should be used in performing this crucial  
12          role of yours as exclusive arbiters of credibility of  
13          witnesses.  
14

15                       Further on the subject of witnesses, you of  
16          course are well aware that we **heard** from Archie Van Putten who  
17          the law sometimes refers to as a so-called accomplice wit-  
18          ness. It is true that under Federal law a jury is entitled  
19          to convict a person on the uncorroborated testimony of an  
20          accomplice witness. That is the law. However, I point  
21          out to you that you ought to consider the testimony of  
22          Van Putten with particular care. I think the reasons are  
23          obvious. But one of them, for example, is this. As  
24          Archie Van Putten admitted to you, he pleaded guilty before  
25          me, as a matter of fact, as he told you, oh, quite some

1 weeks ago. He has not yet been sentenced, and under the  
2 system we follow in this court, as he pointed out, I  
3 theoretically at least, and indeed I expect actually, to  
4 be the sentencing Judge.

5  
6 Now, consider, therefore, whether or not Van  
7 Putten is thinking rightly or wrongly, it makes no difference  
8 which, that if he comes in here and tailors his testimony  
9 a little bit or tells a few lies or obfuscates things a bit,  
10 maybe he will get a favorable sentence. In other words, if  
11 he gives some testimony favorable to the prosecution.  
12 That is a perfectly real possibility, as I am sure you can  
13 understand, and you ought to consider that.

14 On the other side of the coin just because a  
15 man has pleaded guilty and just because he hasn't yet been  
16 sentenced doesn't necessarily mean he is going to come in  
17 here and tell the jury and the Judge a lot of lies. There  
18 is no rule in life that says that, either.

19 The point I am trying to get across is this  
20 is an important consideration as the arguments of the  
21 defendant brought out, and I think you should be particularly  
22 careful to think about this among other things when you  
23 scrutinize Van Putten's testimony with particular care.

24 Another thing which I am sure is equally  
25 obvious to you, but I better mention it, and that is this.

1  
2 We have had two men who came in from the Drug Enforcement  
3 Agency of the Department of Justice, which used to be known  
4 in bureaucratised as BNDD or the Bureau of Narcotics and  
5 Dangerous Drugs. Just because these men happen to be  
6 Government agents or officials of course doesn't mean their  
7 testimony is somehow special or sacrosanct. Of course  
8 that is not so. In other words, you are entitled to  
9 scrutinize their credibility and the weight which their  
10 evidence deserves, just as you would any other witness who  
11 comes in here.

12 Now, there is one other point which I had  
13 omitted to state earlier, and that is this. You will  
14 remember that Agent Ferrarone, and to a certain extent  
15 Agent Levine, told us about the events of the night of  
16 July 30 after Davila and Van Putten were arrested in the  
17 Bronx Whitestone parking lot, and they, particularly Ferrarone,  
18 went into what happened to an extent on the ride down,  
19 but most importantly when they got over to the headquarters  
20 of the drug agent's office -- that is, over on 57th Street  
21 here in Manhattan.

22 Well, the Government claims that some of the  
23 things which Mr. Davila was stated by Ferrarone to have said  
24 to the agents were palpably false, and, therefore, the  
25 Government argues to you that those were what lawyers call

1           false exculpatory statements, to wit, false statements  
2           which are an indication of guilty knowledge on the part  
3           of the accused.  
4

5                       Well, let me point out that it is true that  
6           under the law it is recognized that proof that a person  
7           makes to the police, for example, shortly after the event  
8           false statements about his involvement in the event, if  
9           that is proven to have happened, then the fact finder, such  
10          as a jury, can infer from that that the defendant's  
11          willingness to make false statements to the authorities is  
12          some indication of guilty knowledge on his part.

13                      First you have to decide whether in fact  
14          Davila made any false statements at all to the arresting  
15          officers or any other agents at 57th Street. Assuming  
16          you did, then you have to decide whether or not you want  
17          to draw the inference that this is some evidence of guilty  
18          knowledge on his, Davila's part.

19                      You can either draw that inference or not, as  
20          you see fit.

21                      Now, I have come virtually to the end of my  
22          remarks. However, I want to say to you that we require  
23          under the law a unanimous verdict from you in respect to  
24          each of these three counts which you are to decide, Counts  
25          1, 2 and 3.

2 All we mean by that is that you should report  
3 a general verdict on each of these three counts through  
4 your foreman, Mr. Ramos, when you come back from your  
5 deliberations.

6 Very simply, that means that Mr. Ramos will  
7 simply report to us that you unanimously either find the  
8 defendant guilty or not guilty of Count 1, Count 2, and  
9 Count 3.

10 One other point. You are entitled to see  
11 any and all exhibits which were admitted into evidence during  
12 our trial. My practical advice to you is you wait until  
13 you retire to deliberate, and then if you want to see any  
14 one or more of the exhibits you simply have to send a note  
15 out to me and Messrs. Sulahian, Wile, and myself will see  
16 to it that you get whatever you ask for.

17 Again, would you mind just sitting patiently  
18 a moment or two longer? I want these gentlemen to come  
19 into the robing room. Perhaps I misstated something un-  
20 wittingly or left something out, and then I will come back  
21 and submit the case to you.

22 (In the robing room.)

23 MR. WILE: The Government had requested a charge  
24 concerning the responsibility of a co-conspirator. I  
25 think the acts are not important but the declarations are.

1                   mdb  
2                   THE COURT:    You are technically correct, but  
3                   that is a throw-away designed only to titillate lawyers  
4                   and Judges, at least in the context of this kind of a case.  
5                   I refuse to say further.   Technically, you are quite right,  
6                   my dear young man, but obfuscation is one of our longest  
7                   suits, and I don't want to do any more of that than I have  
8                   to.

9                   MR. WILE:    I have another nit to pick, which  
10                  is that you misspoke yourself concerning the numbers of  
11                  the exhibits and the counts to which they related.

12                 THE COURT:   I may well have.   What did I say?

13                 MR. WILE:    I believe you said Exhibits 1 and  
14                  2 relate to Counts 1 and 2, when in fact they relate to 2  
15                  and 3, but I doubt anybody is going to be confused.

16                 THE COURT:   You are quite right, and I will  
17                  correct it.

18                 MR. WILE:    Concerning the Court's charge concern-  
19                  ing accomplice testimony, the Government's requested  
20                  language that the Government is frequently unable to  
21                  obtain convictions without the cooperation of an accomplice,  
22                  that language was not given and in light of the charge  
23                  given I would renew the request the charge be given concerning  
24                  the defendant's interest in the case.

25                 THE COURT:   You are right, and I didn't really

1 intend to leave it out, that was inadvertent, but whether  
2 it is worth going into at this late stage I want to weigh  
3 a few moments.

4 What about you?

5 MR. SULAHIAN: I am satisfied with the charge,  
6 your Honor.

7 THE COURT: You will just have to bear with  
8 me. I want to check what you said. As I remember, it is  
9 completely fair and accurate. I am just troubled as to  
10 whether we should go back into it again now. I will have  
11 to look at it.

12 (In open court; jury present.)

13 THE COURT: Two things, ladies and gentlemen.  
14 First of all, the lawyers quite correctly, as I see it now,  
15 pointed out that I misspoke. I don't think you were misled  
16 at all because what I said was an obvious mistake, but  
17 you will remember I said that my understanding is that the  
18 two exhibits, Government Exhibits 1 and 2 in evidence,  
19 relate respectively to Counts 1 and 2. Obviously, that  
20 is not quite precise. Basically, they relate respectively  
21 to Counts 2 and 3. They, of course, both of them, relate  
22 to Count 1, too, the conspiracy count, you understand that.

23 The second thing is this. I was discussing  
24 with you some of the rules having to do with so-called  
25

1 accomplice testimony. I explained to you, for example,  
2 that under the law, that is Federal law, a person can be  
3 convicted on the uncorroborated testimony of one accomplice.  
4 On the other hand, I asked you to consider Van Putten's  
5 testimony with particular care for the reasons I stated.  
6

7 I do not want to infer or have you infer, however,  
8 that there is something wrong or illegal or immoral or unfair  
9 about using accomplice witnesses in trials of this kind.  
10 I am sure you all understand that, that very frequently  
11 the Government or the prosecution can not prove charges  
12 of crime without using persons who actually participated  
13 therein. I am sure you all understand that. There is  
14 nothing faintly unfair or wrong or obscene about using  
15 accomplice testimony. So I won't say anything further  
16 about that.

17 Now we will have the marshals sworn, and then  
18 I will commit the case to you, and I have a clean copy of  
19 the indictment. I have excised all other allegations except  
20 Counts 1, 2 and 3, and I am going to have Mr. Viscardi give  
21 to you to use, as a guide only, in your deliberations.

22 (Marshals sworn.)

23 (Time noted 3:25 P.M.)

24 THE COURT: All right, ladies and gentlemen.  
25 Mr. Ramos and ladies and gentlemen, you may retire

1 with the marshal to take up your deliberations.

2 (Jury retired at 3:25 P.M. to begin their  
3 deliberations.)

4 (In open court; jury present, 5:40 P.M.)

5 THE COURT: Mr. Ramos, and ladies and gentlemen,  
6 my purpose in interrupting you is to find out whether  
7 or not you believe that you would be able to reach a  
8 verdict soon. If not, I am going to give you some instruc-  
9 tions and send you home and have you come back tomorrow  
10 and resume.

11 So you tell me, do you think you can reach  
12 a verdict soon? What is your pleasure in this regard?

13 JUROR No.8: Far apart, far apart.

14 THE COURT: There seems to be agreement that  
15 you won't.

16 JUROR No. 11: Does the jury have the right  
17 to ask any questions other than clarifications of legal  
18 procedure?

19 THE COURT: You have the right to ask for  
20 exhibits, if you want to have some testimony re-read we can--

21 JUROR No. 11: What about if a point did not  
22 come up in the testimony.

23 THE COURT: Well, you have to base that on  
24 your recollection. In other words, that is what I was  
25

trying to stress, it is your recollection and your recollection alone.

JUROR No. 11: But it didn't come up at all.

THE COURT: If that is your recollection, that is your recollection. But if you want an exhibit or testimony read to make sure, you have a right to ask that.

JUROR No. 11: But there is no way to clarify a point that did not come up?

THE COURT: No, if I understand you are asking us to substitute our recollection.

JUROR No. 11: No --

JUROR No. 10: No, they are talking about something not asked, and they want an answer to.

THE COURT: If it didn't come out, it didn't come out.

JUROR No. 11: That is the point. If it is not in the testimony --

THE COURT: If it is not in the testimony, it is not there, and we can't substitute our judgment for something that is not there. Do you follow what I am saying?

JUROR No. 11: Yes.

THE COURT: Now, since I understand you all to be saying you don't think you will reach a verdict very soon, here is what you want you to do. I want you

1           mdb  
2           to go home to your own business, and I want you to be  
3           very careful not to mention, discuss, or even think about  
4           what your deliberations have been so far. They are nobody  
5           else's business, and that includes your family and your  
6           loved ones and your friends, it is not their business, it is  
7           yours, and when you come back in the morning -- and I am  
8           going to ask you to come back at ten o'clock, then you  
9           pick up right where you left off.

10                   Now, also, though I haven't the slightest reason  
11           to believe this will happen, if anybody approaches you  
12           over the evening recess and tries to ask you anything about  
13           this case, you avoid them, and then I would appreciate  
14           your telling me tomorrow if anybody makes such an attempt.  
15           I stress I haven't the slightest reason to believe that  
16           any such thing will happen, but a word to the wise in advance  
17           may be better than none.

18                   So, if you would go home now, go immediately  
19           into your jury room at ten o'clock sharp tomorrow. I will  
20           be here with another case, but Mr. Sulahian and Mr. Wile  
21           will also be here, and if you need anything I will interrupt  
22           whatever I am doing to give you first priority, so don't be  
23           concerned about that.

24                   Without any further ado then, I will say good  
25           night to you all.

(Adjourned to March 13, 1974, at 10:00 A.M.)

United States of America

v.

73 Cr. 1067

Wilson O. Davila

New York, New York.  
March 13, 1974 - 10:00 A.M.

(Note from the jury at 11:10 A.M.)

(In open court; jury present.)

THE COURT: Good morning, Mr. Ramos, ladies  
and gentlemen.

I have your note and I want to make sure I  
understand it. As I read it, you are saying that you have  
not agreed on Count 1, the conspiracy count, you have not  
agreed on Count 2, but you have reached a verdict on  
Count 3.

Is that correct?

JUROR No. 1: That is correct.

THE COURT: What we will do is I will ask the  
clerk to take your verdict with respect to Count 3. Then  
I will discuss the matter with you further, as soon as we  
get that done.

THE CLERK: Members of the jury, please  
answer present as your name is called.

2 (Jury roll called, all jurors present.)

3 THE COURT: Mr. Foreman, has the jury agreed  
4 upon the verdict with respect to Count 3?

5 THE FOREMAN: Yes.

6 THE COURT: How do you find the defendant Wilson  
7 O. Davila in Count 3?

8 THE FOREMAN: Guilty.

9 THE CLERK: Members of the jury, please listen  
10 to your verdict as it stands recorded. You say you find  
11 the defendant Wilson O. Davila guilty to Count 3, so say  
12 you all.

13 THE COURT: All right.

14 Now, ladies and gentlemen of the jury, I am  
15 going to ask you to try again on Counts 1 and 2. I know  
16 you have been discussing this now for some hours, yesterday  
17 and you have been deliberating for an hour and ten minutes  
18 so far this morning.

19 Now, under the law, it certainly is also true  
20 that each one of you is entitled to your own views, and  
21 to vote those views as you see fit.

22 Notwithstanding, I believe that with a little  
23 more discussion and with listening to the views one of  
24 the other that you are likely to come to an agreement one  
25 way or the another in respect to Counts 1 and 2.

1  
2 I know of no particular reason to think that  
3 the lawyers and the parties haven't endeavored to bring  
4 everything that they wanted to bring to your attention by  
5 way of evidence. They have argued it as best they could.  
6 You have listened certainly, as I have observed before, very  
7 carefully to all of this, so I am going to ask you to go  
8 back to the jury room and consider Counts 1 and 2 again.  
9 And see if you can't reach a unanimous verdict one way  
10 or another in respect to those two remaining counts.

11 I will be here, and after you have done this,  
12 why, you send me a note as to whatever happens. If there  
13 is any help we can give you, let me know that, but I think  
14 the parties would like a resolution of all of this, if  
15 possible.

16 So let's give it another try, and if you can't  
17 agree you can't agree. It won't be the first time or  
18 the last time that that sort of thing happens, but I rather  
19 think if you listen to one another's views carefully again  
20 that maybe you can come to an agreement one way or another  
21 on the two remaining counts.

22 So if you would, please retire and discuss it  
23 and see if you can't come to an agreement on Counts 1  
24 and 2.

25 Thank you.

xxx

(Court Exhibit 1 marked.)

MR. WILE: Your Honor, may I make one observation, which is, I think it is obviously necessary to have the jury deliberate for a reasonable time hereafter and if they are unable to agree --

THE COURT: I didn't suggest anything to the contrary, believe me. I understand you.

MR. WILE: Very well.

(In open court; jury present.)

(12:55 P.M.)

THE COURT: Mr. Foreman, I thought I would inquire, given the hour, whether or not the jury had been able to reach a verdict on Counts 1 and 2.

THE FOREMAN: The jury reached a verdict on all three counts, guilty.

THE COURT: All right. Then we will proceed to take those verdicts on Counts 1 and 2.

Thank you, Mr. Ramos.

THE CLERK: Members of the jury, please answer present as your name is called.

(Roll call of the jury, all being present.)

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes.

2 THE CLERK: How do you find the defendant Wilson  
3 O. Davila in Count 1?

4 THE FOREMAN: We find him guilty.

5 THE CLERK: Count 2?

6 THE FOREMAN: Guilty.

7 THE CLERK: Members of the jury, please listen  
8 to your verdict as it now stands recorded.

9 You say you find the defendant Wilson O. Davila  
10 guilty on Counts 1 and 2, and so say you all.

11 THE COURT: Before we excuse the panel, Mr.  
12 Sulahian, would you want the jury polled with respect to  
13 its earlier verdict on Count 3 and the Counts 1 and 2 now?

14 MR. SULAHIAN: If the Court will, yes.

15 (Jury duly polled; all answer in the affirmative.)

16 THE COURT: All right. Mr. Ramos and ladies  
17 and gentlemen of the jury, I don't want to keep you long,  
18 but I do want to thank you again for your patience not  
19 only in your deliberations, but also through out trial.  
20 It was a pleasure, so far as I was personally concerned,  
21 to serve with you, and I wish you God speed.

22 I don't know what news we have for you with  
23 regard to continuing.

24 THE CLERK: They are excused, your Honor. They  
25 have completed their service.



VETERANS ADMINISTRATION  
HOSPITAL  
EAST ORANGE, N.J. 07019

March 8, 1974

IN REPLY  
REFER TO: 561/136D4

William A. Sulahian, Esq.  
15 Front Street  
Station Plaza Building  
Rockville Centre, N.Y. 11571

DAVILA-Santiago Wilson O.  
SS# 090-38-5730

Dear Mr. Sulahian:

I certify that the thirty page copies forwarded to your office February 19, 1974 on Mr. Santiago Wilson Davila are true photostatic copies of the original hospital records on that patient, maintained at the Veterans Administration Hospital, East Orange, N.J.

Sincerely,

*Gerri Gelman*  
GERI GELMAN

Medical Records Librarian

USA 33a - 475  
(ED. 4-23-71)

DEFENDANT

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

1  
MAR 12 1974

*A* *ed*  
FPI-MI-12 6-73 10M-1510

Show veteran's full name, VA file number, and social security number on all correspondence.

PATIENT'S NAME <i>Paula Marie Wilson</i>	AGE <i>23</i>	SEX <i>FM</i>	RACE <i>PR</i>	CLAIM NO. <i>1401 3493</i>	SOCIAL SECURITY NO. <i>19A-38-5436</i>	NAME OF HOSPITAL <i>50 011</i>
DIAGNOSES (List and number in order of clinical importance all established diagnoses for which treatment was given. Place the letter "A" before the one diagnosis responsible for the major part of the patient's stay. For release to Nursing Care, place letter "N" before diagnosis(es) responsible for Nursing Care placement.)						

*Chronic Active Hepatitis with cirrhosis*

ICDA CODE

*571.0*

Major diagnoses noted but not treated

OPERATIONS PERFORMED AT THIS HOSPITAL OR ELSEWHERE UNDER VA AUSPICES DURING CURRENT ADMISSION

DATE

*Liver biopsy*

*Rectal biopsy*

*3/19/73*

*A119*

*3-29-73*

*A118*

VA Form 10-1214 completed  
Date *JUN 6 1973*

SUMMARY (Brief statement should include, if applicable, history; pertinent physical findings; course in hospital; treatment given; condition at release; date patient is capable of returning to full employment; period of convalescence, if required; recommendations for follow-up treatment; medications furnished at release; competency opinion when required; rehabilitation potential; and name of Nursing Home, if known.)

*23 yr old, P.R., c hx of hepatitis while in the service in 1969; admitted b/c of body malaise & ch + jf jaundice ever since 1969. Denies hx of alcoholism or drug abuse*

*PE: Sclera icteric; no stigmata of cirrhosis*

*No Asterix*

*Hepa - 18x10cm, firm. non tender, no ascites*

*Spleen - palpable & firm*

*No peripheral edema*

*Lab. OT = 225-260*

*PT = 46-96*

*T.B.L = 21-115*

*Hct - 38 wbc - 4600 FBS - 80*

*HAA - neg*

*STOTT OVA - neg*

*UDRL (-) ANA (-)*

*Immunoglobulin - PTGC + 2CH*

*Protein elect - 4 globulin*

*Rheumatoid factor (-)*

*PPD intermediate (-)*

*Course: PT was placed on bed rest and liver tx started. Chronic Active Hepatitis & cirrhosis. PT was started on Prednisone 60 mg/day & 3 weeks later reduced gradually to 20 mg/day (maintenance dose). Clinically, he felt a lot better. Jaundice improved about 50%. c no significant change of transaminase. PT is discharged in fair condition, to be followed in Liver Clinic.*

ADMISSION DATE <i>2/28/73</i>	DISCHARGE DATE <i>5/11/73</i>	TYPE OF RELEASE <i>PAC. 1111</i>	INPATIENT DAYS <i>72</i>	ABSENCE DAYS <i>(1)</i>	WARD NO. <i>5C</i>	SIGNATURE OF PHYSICIAN <i>T. Co</i>
----------------------------------	----------------------------------	-------------------------------------	-----------------------------	----------------------------	-----------------------	--

VA FORM 10-1000  
JAN 1971

10-1000  
JUL 1970 WDC:RD:USC:10-1000

HOSPITAL SUMMARY

1973

55

COPY RECEIVED  
JUL 9 1974  
PAUL J. COUGRAN  
U. S. ATTORNEY  
SO. DIST. OF N. Y.